2013 WL 5593325 (Ind.App.) (Appellate Brief)
Court of Appeals of Indiana.

In the Matter of: The Supervised Estate of Mildred BORGWALD, Deceased, Appellant,
v.
OLD NATIONAL BANK and Raelynn Pound, Appellees.

No. 84A01-1302-ES-80.
August 29, 2013.

Appeal from Vigo Superior Court
Trial Court Cause No: 84D01-1004-ES-3250
Honorable John T. Roach, Judge

Appellant's Brief

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***1 STATEMENT OF THE ISSUES PRESENTED FOR REVIEW**

The issues presented for review are:

(1) Whether the trial court erred in excluding the medical assessment and opinion of Dr. Robert C. Lalouche ("Lalouche"), a physician who had graduated from UCLA Medical School, Duke University OB/GYN residency and who had twenty-one years of experience treating women, many of them **elderly**, that the decedent was incompetent;

(2) Whether the trial court erred in refusing to admit unredacted certified copies of the medical records which contained the observations of the nurses and physicians regarding the mental and physical status of the decedent.

(3) Whether the trial court erred in disregarding the evidence that the decedent was blind and had been since 2001, and that the closing agent did not read the closing documents to the decedent but the Court nevertheless found as a matter of law that the mortgage, note and loan documents were voluntarily executed, binding and enforceable.

(4). Whether or not the trial court erred in refusing to allow counsel for the Estate to make an offer to prove regarding the testimony of Lalouche.

***2 STATEMENT OF THE CASE**

This appeal involves the review of an order and judgment of foreclosure of an equity line of credit and mortgage against the Estate of Mildred Borgwald, deceased (the "Estate") by Old National Bank. ("ONB"). Mildred Borgwald ("Mildred") executed a Last Will and Testament on March 21, 2001. (TR., Ex. 1). The will bequeathed $1.000 each to five grandchildren, including Appellee Raelynn Pound ("Raelynn"), and gave the residue of the estate to Mildred's only child, Lana McGee ("Lana"). (TR, Ex. 1) In addition, Lana was named as Co-Executor of the will along with Brent Pound, a grandson, who never subsequently qualified as co-executor. (Ex. 1).

On August 29, 2008 Mildred died and an estate (the "Estate") was opened by Lana on April 19, 2010. (App. 24). ONB filed a claim in the Estate on July 15, 2010. (App. 25). The Estate disallowed the claim and it was initially disallowed by the Court. (App. 6). ONB's counsel filed a Motion to Correct Error and for Relief from Judgment and the Court granted the motion and the matter was set for pre-trial conference and trial. (App. 7-8). Trial was originally set for September 8, 2011 and the parties were ordered to exchange preliminary witness, exhibit lists and contentions and to file any amendments to the pleadings by May 13, 2011. (App. 8). Discovery was ordered to be completed and final witness lists, exhibits list and contentions were ordered ***3** filed by the final pre-trial conference on August 8, 2011. (App. 8). On May 13, 2011 ONB filed Preliminary Witness, Exhibit List and Contentions but the Estate added a new party when it filed a Petition to Recover Assets and to Determine Rights and Liabilities of the parties and sought relief against Raelynn for obtaining funds from Mildred through the ONB equity line and mortgage prior to Mildred's death. (App. 8). On July 8, 2011, the Estate filed Preliminary Witness and Exhibit Lists. (App. 8).

On August 24, 2011, after the filing of the Petition to Recover Assets from Raelynn and to determine the rights and liabilities of the parties, another pre-trial conference was held with her counsel present and the Court vacated the bench trial set for September 8, 2011. (App. 9). The Court conducted a pre-trial hearing on December 16, 2011 and the Court ordered the parties to file and exchange preliminary witness lists, exhibit lists and contentions by January 16, 2012. (App. 10). Discovery was ordered completed by February 15, 2012 and final lists of witnesses, exhibits and contentions were ordered filed by April 9, 2012. (App. 10). A bench trial was scheduled for April 27, 2012. (App. 11).

On January 17, 2012 Raelynn and ONB filed Preliminary witness, Exhibit lists and contentions.)App. 11). Raelynn and ONB filed Final Witness and Exhibit Lists and Contentions on April 9, 2012. (App. 11). On April 16, ***4** 2012 the Estate filed its Final Lists of Witness, Exhibits and Contentions. (App. 12). Also on April 16, 2012 ONB and Raelynn filed a Joint Motion to Exclude all medical evidence. (App. 12, 73). On April 23, 2012 the Court denied the Joint Motion ton Exclude medical evidence, vacated the trial set for April 27, 2012 and ordered that formal requests for discovery directed to the Estate be filed within the next two days and include discovery of anticipated opinion testimony. (App. 13). The Court also order Final Witness

and Exhibit Lists to be filed within seven days and the Estate was ordered to provide certified copies of the Union Hospital and Dr. Janicki records within fourteen days. (App. 13)

On April 25, 2012 Raelynn filed a Notice of Service of Interrogatories and Request for Production on the Estate and on April 30, ONB filed a Final Witness, Exhibit List and Contentions. (App. 13). On May 30, 2012 ONB filed a Renewed Motion to Exclude expert medical evidence and the next day, on May 31, 2012 the Estate filed a Notice of Compliance with Discovery Requests and the Estate's Updated Final Witness and Exhibit Lists, which included Dr. Robert L. Lalouche, an expert medical witness. (App. 14). On June 1, 2012 the Court and parties held a telephone conference and Raelynn requested an opportunity to join in ONB's Renewed Motion to Exclude expert medical evidence. The Court gave the Estate until June 8, 2012 to file a response to ***5** the Renewed Motion to Exclude. (App. 14). On June 8, the Estate filed its Response to the Renewed Motion to Exclude. (App. 14).

On June 14, 2012 the Court conditionally granted the Renewed Motion to Exclude and ordered the Estate to set forth the substance of the facts and opinions to which Lalouche was expected to testify and a summary of the grounds for each opinion. The Report was to be provided to opposing counsel and filed with the Court by July 6, 2012 at 4:00 P.M. (App. 15). Lalouche was, if requested, to be made available at the Estate's expense for deposition no later than August 3, 2012. The matter was set for bench trial on August 24, 2012. (App. 15).

On July 6, 2012 the Estate filed a Notice of Compliance along with a copy of the written report of Lalouche. (App. 15). On July 11, 2012 ONB and Raelynn filed a Joint Motion to Reconsider the Motion to Exclude the opinion of Lalouche. (App. 15, 96). In this Motion to Reconsider, ONB and Raelynn contended that Dr. Lalouche, a graduate of the UCLA Medical School, and a board-certified OB/GYN was not qualified to render an opinion under Indiana Rules of Evidence 702 because he was not a treating physician. (App.96-97). On July 13, 2012 the Estate also filed a Notice of Compliance with the Court's order to provide a deposition of Lalouche and served opposing counsel with notice of the deposition to be taken on July 19, 2012. (App. 16). On the same ***6** day they received notice of Lalouche's deposition, July 13, 2012, ONB and Raelynn's counsel filed a Motion to Quash the deposition of LaLouche. (Tr. 16). In this Motion to Quash, ONB and Raelynn contended that even though the deposition was in compliance with the Court's order of June 28, 2012 requiring it to be prior to August 3, 2012, that since it had been noticed as a video deposition to be taken by the Estate, rather than a discovery deposition. (App. 99.). The Court, on July 13, 2012, granted the Motion to Quash and ordered the Estate to file its response to the Motion to Reconsider the Motion to Exclude Dr. Lalouche's testimony within ten days. (App. 16).

On July 17, 2012 the Estate filed its response to the Motion to Reconsider the Motion to Exclude Dr. Lalouche's testimony. (App. 16, 105). In its response, the Estate contended that as a graduate of UCLA Medical School and Duke University Medical School OB/GYN residency, Dr. Lalouche was qualified to render testify on the competency of **elderly** women since he had treated scores of them in his practice. (App.105). The next day, on July 18, 2012, the Court granted the Joint Motion to Reconsider the Motion to Exclude the Lalouche testimony and the opinion of Dr. Lalouche was excluded from the trial. (App. 16, 107-108).

On August 3, 2012, the Estate moved to continue the trial or to add additional medical experts, which motion was denied by the Court. (App. 17). ***7** On August 27, 2012 the trial began but did not conclude and was continued for further proceedings to be held on October 26, 2012. At that time the trial resumed and was concluded. (App. 17). Following the trial, on January 25, 2013, the Court entered its Findings of Fact and Conclusions of Law and granted an in rem judgment in favor of ONB and against the Estate's real estate in the sum of $70,162.82 and allowed its claim in that amount. (App. 18, 24-33). The Court ordered foreclosure of the mortgage held by ONB and denied the claim of the Estate against Raelynn. (App. 18-19, 24-33). The Estate filed its timely Notice of Appeal on February 22, 2013. (App. 19).

STATEMENT OF FACTS

Mildred Borgwald was ninety-five years old when she died on August 20, 2008. (TR. 5). On March 21, 2001 Mildred executed her Last Will and Testament, leaving $1,000 to five grandchildren and the residue and remainder of her estate to her daughter,

Lana McGee. (TR. Ex. 1). On the same date that she executed her Will, Mildred granted to Lana a general, durable power of attorney, which was to "become effective upon my doctor's written declaration that I am unable to manage my own affairs." (TR. Ex. 2). In 2001 Mildred was under the care of Dr. Lance Pickerill, an opthamologist in Terre Haute for her eye care. (TR. 35). Mildred required someone to go with her if she went ***8** anyplace outside her home due to her confusion and blindness. (TR. 33). Lana had been the sole caregiver for Mildred, who was a widow, following Mildred's husband's death in 1990. (TR. 34).

On July 17, 2001, Dr. Pickerill executed a certificate in order to make Mildred's power of attorney in favor of Lana to be effective. (TR. 38). The certificate, TR. Ex. 3, stated that Lance Pickerill, M.D., was a physician practicing in the State of Indiana and Mildred was his patient. (TR. 38). Dr. Pickerill further opined that Mildred "is not able to manage her own affairs due to the onset of blindness." (TR Ex. 3). He further stated that the certification was being given for the purpose of activating the power of attorney executed by Mildred on March 21, 2001. (TR Ex. 3).

Mildred had fallen in 2003. (TR. 40). During this period Lana had found Mildred sleeping outside on the porch at night and became concerned for her safety and started making sure she was in bed at night due to such confusion. (TR. 41-42). By July of 2007 Mildred had been unable to recognize Lana's husband, Ken, when he went over to her house to get a hammer he had left. (TR. 44). In June of 2007 Mildred fell and had to go to the hospital. (TR. 49-50). Mildred had broken her shoulder and during her hospital stay she had a pacemaker installed. (TR. 49-53). It was during this time that Lana observed Mildred calling out to her deceased husband who was named Eddie. (TR. 49).

***9** After she was discharged from the hospital, Mildred had Visiting Nurses Association ("VNA") caring for her in her home. A certified copy of the VNA records were offered into evidence at the trial as Exhibit 4. However, the Court sustained ONB counsel's objections to these records based upon a citation he gave to the trial court, namely, Brooks v. Freeman, 760 N.E.2d 606. Counsel's contention was that in order for medical records to be admissible there must be a medical expert available to "draw any inferences from anything." (TR. 11). Based upon this ruling the Court required the parties to redact the VNA records (Ex. 4) to take out observations, medications, medical information, historical information and much more. In order to be able to visualize the redacted language, a copy of unredacted VNA records is included in the Appendix (App. 110-162). A similar approach was made to Dr. Janicki's records, which were offered at the trial as Ex. 11.

In October 2007 while Mildred was being cared for by her granddaughter, Raelynn, she signed an application to borrow $55,000 on her house. (Ex, 5). At that time Mildred's income was $1,127.00 per month from Railroad Retirement. (TR. 86). Ultimately, ONB advanced $36,000 on Ex. A, its Equity Access Line of Credit. (TR. Ex. A). The $36,000 was deposited in an account at ONB and Raelynn wrote checks on the account and withdrew the full $36,000. (TR. Ex. 10).

***10** At the time that she came into ONB to obtain the Equity Line of Credit and Mortgage, Mildred was accompanied by Raelynn. (TR. 229). Mildred was in a wheelchair. (TR. 229). The loan officer who handled the closing testified that she "pointed out" the places for Mildred to sign the Equity Line and Mortgage documents. (TR. 231). Mildred told the closing officer, Denise Keegan, that she had trouble seeing, (TR. 231). Despite that knowledge on the part of Keegan, she did not read the documents to Mildred. She testified: "Not word for word. I never read a document word for word. Closing would take four hours if I read every single word of every single document." (TR. 232). Keegan also testified that no one else at ONB met with Mildred but that her assistant, Alice Weir, had notarized the mortgage document. (TR. 240). The document indicates that Mildred had "read all the provisions of this mortgage...and...agrees to its terms." (Ex. B). And although Mildred met with no one else at ONB the individual acknowledgment stated that she acknowledged that she signed it of her own free and voluntary act. (TR Ex. B).

STANDARD OF REVIEW

The standard of review governing the admissibility of Dr. Lalouche's medical testimony and opinion under Indiana Rule of Evidence 702 as well as the admissibility of evidence in general is based on **abuse** of the court's discretion. Similarly, on the admissibility of medical records and the ***11** requirement that they be redacted, the **abuse** of discretion standard of review

would also be applicable. *Doe v. Shults-Lewis Child and Family Services*, 718 N.E.2d 738; *Think Tank Software Development Corporation v. Chester, Inc.*, 988 N.E.2d 1169, 1175-76 (Ind App. 2013).

SUMMARY OF ARGUMENT

A. The Court Erred in Excluding the Testimony of Lalouche

A review of the record in this case indicates that ONB and Raelynn's counsel were bent on excluding any medical evidence offered by the Estate to attempt to prove that Mildred was incompetent and was under Raelynn's influence when she executed the Equity Line Note and Mortgage. However, the Court erred in concluding that Lalouche's testimony was inadmissible under Indiana Rule of Evidence 702 ("IRE" 702) because he was not a treating physician. The requirements of admissibility under Rule 702 do not require that a physician have examined or even met the patient. Rather, the issue for the court is whether or not scientific or other specialized knowledge of the expert witness will assist the trier of fact to understand the evidence. (IRE, 702(a).

In this case, ONB and Raelynn's counsel objected to the admissibility of medical evidence from the beginning of the case on the grounds that no medical expert was available to explain it or to be cross examined. (TR 9-11 ***12** It is clear that had the Court allowed the testimony of Dr. Lalouche, a qualified physician with twenty-one years worth of experience treating and examining women as patients, many of them **elderly**, he could have explained many of the medical records and have enlightened the Court as to the significance of the records--just as demanded by ONB and Raelynn's counsel. However, by excluding Lalouche's testimony, the Court **abused** its discretion and deprived itself and the parties of the insight which a qualified expert could bring to the medical records.

B. The Trial Court Erred in Refusing to Admit Unredacted Records

At the trial, ONB and Raelynn objected to the admission into evidence of the VNA records and the records of Dr. Janicki. The reasons they gave the trial court were that the medical opinions and conclusions were inadmissible under *Brooks v. Freeman*, 760 N.E.2d 606. (TR. 11). However, no such case exists. It is assumed that counsel intended to cite Indiana cases which hold that medical causation must be established by expert medical testimony and that medical records alone or the opinions of non-physicians are inadequate to prove causation. *Hannan v. Pest Control Services, Inc.*, 734 N.E.2d 674, 682 (Ind. App. 2000).

The Court ordered the parties to redact out medical opinions and conclusions from the medical records in this case. However, a review of the ***13** redactions demonstrates that the redactions were far more extensive than simply medical opinions or conclusions. Observations of the nurses as to the status of Mildred, her ability to ambulate, her medication lists and other customary nursing data were excluded by the redaction process and never observed by the Court. Copies of both the redacted records are found at TR., Ex. 4, and unredacted VNA records are included in the Appellant's Appendix at p. 110 and are easy to compare. The process of redaction merely amplified the lack of medical evidence admitted by the Court and cumulatively demonstrated that the trial court **abused** its discretion in preventing the Estate from proving that Mildred was severely limited in her physical and mental functions as well as being blind and hard hearing.

C. The Court Erred in Failing to Consider Mildred's Blindness

The undisputed evidence established that Mildred had been blind and unable to manage her own affairs since 2001. (TR. Exhibit 3). At the time the mortgage was executed by Mildred in front of Denise Keegan and notarized by Alice M. Weir on October 31, 2007, the testimony was clear that the document was not read to Mildred "word for word." (TR. 232). Keegan testified that "I never read a document word for word." (TR. 232). She further stated that: "Closing would take four hours if I read every single word of every single document." (TR. 232). In fact, Keegan admitted that she really didn't know ***14** "how thoroughly she (Mildred) was able to read it...." (TR. 233).

Indiana law requires that for a mortgage or other instrument to be notarized when a blind person executes it, the document must be read to the blind person. I.C. 33-42-2-2(4). In this case, Keegan's assistant, Alice M. Weir was brought in and she would have witnessed the execution of the instruments after Keegan pointed out where Mildred was to sign. (TR. 233). This process violated Indiana's notarization law which was intended to protect the consumer such as Mildred from executing a document she could not read. Accordingly, the trial court erred in finding the mortgage to be a valid and binding document and foreclosing on Mildred's home since she never was able to read the document and it was never read to her word for word.

D. The Trial Court Erred in Refusing to Allow An Offer of Proof

Near the conclusion of the first day of the trial counsel for the Estate mentioned that he desired to call Dr. Lalouche as a witness. The Court inquired if it was counsel's intention to call Dr. Lalouche and counsel indicated that it was his intention to call him to make an offer of proof if nothing else was being allowed by the Court. The Court then indicated that it was going to consider Lalouche's report as the offer of proof and that if Lalouche were called he would testify in accordance with his report. (TR. 131). However, the Court stated that his ruling on the admissibility of Lalouche's testimony... "stands as ***15** it was before, he was not going to be allowed to be a witness or testify for the reasons I gave in my order." (TR. 131). The Court then indicated that Lalouche's report was in the court file and then the Court announced:

In other words, he's not coming here and you're not going to put him on the stand and he's not going to give his opinion as your offer of proof, that's not going to happen.

(TR. 132).

ARGUMENT

A. The Trial Court Erred in Excluding Lalouche's Testimony

The record of this case demonstrates that the defense approach was to exclude all the medical evidence and opinion or dilute it so that it had no weight or credit upon which the court could base a finding that Mildred was incompetent or unable to manage her own affairs. To this end, ONB and Raelynn's counsel filed multiple motions to exclude medical evidence, culminating with their multiple motions to exclude the assessment and opinion of Dr. Lalouche that Mildred was blind, incompetent and unable to handle her own affairs.

The thrust of defense counsel's objections to Lalouche's testimony was that he was a non-treating OB/GYN who had never seen Mildred. However, the issue is not whether Lalouche had treated Mildred or not. The issue under IRE 702 is whether or not Lalouche possessed scientific, technical, or other ***16** specialized knowledge which will assist the trier of fact to understand the evidence or determine a fact in issue. A secondary consideration for the court is whether Lalouche was qualified as an expert by knowledge, skill, experience, training, or education. (IRE 702(a). Since Lalouche was a medical doctor and graduate of UCLA medical school, had been trained in OB/GYN at Duke University, and had 21 years of practice seeing women, many of them **elderly**, it is clear that Lalouche possessed expert knowledge, skill, training and experience far beyond the Court, counsel or any witnesses called in the trial.

The trial court required Estate counsel to submit a written report from Lalouche, which is found at pages 94-95 of the Appendix. Dr. Lalouche's written report states that he was asked to review the medical records of Mildred and render an opinion regarding her ability to comprehend a mortgage taken out on her owned home in October 2007. Lalouche indicated that he is a practicing OB/GYN physician with 21 years of experience caring for women, many of whom are **elderly** patients. He graduated from UCLA medical school in 1991 and Duke University OB/GYN residency in 1995. Lalouche found that in August, 2001 the patient was diagnosed by a neurologist with mild early cognitive impairment and also was put on Aricept, a medication used solely for Alzheimer's Dementia, in September, 2001. (App. 94). Mildred was legally blind and had very poor hearing. (App.

94). At Mildred's admission following ***17** her fall in June, 2007, she was discharged with a pacemaker to correct an irregular heartbeat and her vision and hearing were extremely poor.

Dr. Lalouche reviewed the VNA records and found that they indicated that Mildred was blind and had very poor hearing. She required assistance with daily living including **finances** and could not even take medications without assistance. She had significant communication impairment and required multiple repetition, restatements, demonstrations, and additional time. After multiple visits Mildred's discharge assessment was downgraded. Her memory deficit showed failure to recognize familiar persons/places and her cognitive functioning required prompting. (App. 94). Mildred's extensive psychological evaluation in 2008 showed significant cognitive deficits and her CT scan showed no significant change from the year before (2007).

Lalouche's overall assessment was that Mildred was not competent to comprehend a legal document such as a mortgage. (App. 95). She was fully dependent upon her granddaughter after July 2007 for **financial** decisions and a bank encounter would have been an unfamiliar condition which would have resulted in poorer functioning. Her vision and hearing impairment were further exacerbating factors that made it virtually impossible for her to be able to competently evaluate a legal document such as a mortgage. (App. 95).

Counsel for ONB and Raelynn raised objections that it would require a ***18** physician to explain the meaning and import of the VNA records. (TR. 11-12). It was for this reason that Lalouche was requested to review them and render his assessment of their meaning and import. Thus, the Estate was placed in a catch 22-the records were redacted so that no observations of the nurses as to the status, activities, medications or other significant medical information on Mildred was allowed to be presented and when a physician who had dealt with **elderly** female patients for 21 years was called, the Court refused to allow his assessment or analysis of the medical records to be presented. In doing so, the trial court **abused** its discretion.

Admittedly, the trial court had discretion to determine whether Lalouche's expert assessment and opinion was admissible under IRE 702. However, as the Indiana Supreme Court recognized in *Bennett v. Richmond*, 960 N.E.2d 782, 786-787 (Id. 2012), the court must first evaluate whether or not the expert opinion will assist the fact-finder and that the underlying scientific principles are reliable, and if so, then the opinion is admissible but subject to the vigorous cross-examination and presentation of contrary evidence.

Here, there was a complete void of medical or scientific evidence except for the redacted records of the VNA, Janicki and the proffered testimony of Lalouche. While it may not have been testimony by a treating physician who ***19** saw Mildred the day the mortgage was signed, it was of some benefit at least in explaining the observations, evaluations, notes and records of the nurses who were attending to Mildred at the time, and it was an **abuse** of discretion for the Court to absolutely prohibit the Estate from offering an explanation of the medical evidence. In effect, the Court was directing a verdict in favor of ONB and Raelynn by redacting the medical records and then excluding any explanation of them. Accordingly, the Estate submits that the Court erred and it is entitled to a new trial on the issue of the competency of Mildred.

B. The Trial Court Erred in Ordering Redaction

The argument made by ONB and Raelynn that Indiana law renders medical records inadmissible if they contain the nursing notes, medication lists, and observations of the nurses is not founded upon the case cited to the Court. Counsel for Appellant has been unable to locate the cited case and the page citation is to *Neher v. Hobbs*, 760 N.E.2d 602 (Ind. App. 2002), which has no application to the issue. The gist of the argument was that medical opinion evidence is required to draw inferences from medical records and there was no one being called (Lalouche had been excluded) who could explain the nursing records. Thus, they were inadmissible unless redacted to take out diagnoses, opinions or prognoses. However, the redaction which was done at the Court's direction excluded the medications Mildred was on, the nurses notes ***20** concerning her mobility, the nurses note regarding Mildred's requirement for assistance in daily activities and much more. These were hardly diagnoses or opinions, but were the kind of day to day nursing records which show the patient's status and her progress or the lack thereof by the patient.

For example, on the first page of the VNA records, (Ex. 4) the redaction of Mildred's vital signs, her pain level and the fact that she was blind and hard of hearing were all redacted. (Compare to App 110). Similarly, Mildred's severe visual impairment was documented (App. 112) but redacted on Page 3 of Ex. 4). The fact that Mildred was confused in new or complex situations was also redacted at p. 4 of Ex. 4. (See App. 113). The fact that Mildred was able to walk only with the assistance of another person was also redacted. (Page 5 of Ex.4). (See. App. 114).

These are only examples of dozens of similar redactions which effectively kept the court from being aware of the nature and extent of Mildred's impairment and lack of ability to function. Cumulatively, along with the exclusion of Lalouche's testimony, they prevented the Court from understanding the nature of Mildred's incompetency and led the Court to conclude that she read and understood the mortgage and was competent to put up her home for collateral when it had not been mortgaged for forty years.

***21 C. The Court Erred in Failing to Consider Mildred's Blindness**

The evidence clearly indicated that Mildred had been blind and unable to manage her own affairs for six years before the mortgage was executed with ONB. One of the first exhibits which the Court received in evidence was the certification of Mildred's opthamologist who certified that she was blind and unable to manage her own affairs. This evidence was not objected to by defense counsel although they subsequently redacted, pursuant to the Court's order, evidence of Mildred's blindness and excluded Lalouche's evidence of her blindness and incompetency.

The records is also quite clear that Denise Keegan did not read the mortgage to Mildred because it would take her four hours to close a loan if she had to read all the documents word for word. Denise Keegan was too busy closing loans and making money for ONB to be bothered with reading the words to an **elderly** customer who was blind.

However, the Indiana General Assembly made provision for blind **elderly** women like Mildred when it adopted I.C. 33-42-2-2(4) which requires the notary to read the instrument to a blind person. ONB should be ashamed of the fact that it makes a practice of quickly closing loans with blind, hard of hearing borrowers in violation of Indiana law. Moreover, the Court should have found that the mortgage was not enforceable since it was never read word for word to ***22** Mildred. The Estate submits that the mortgage should be held unenforceable since ONB has admitted that it did not follow Indiana law in procuring Mildred's signature. For this reason alone, the Order and judgment of foreclosure should be reversed.

D. The Refusal to Allow an Offer of Proof

The final error committed by the Court was when it not only refused to allow the testimony of Dr. Lalouche but also refused to allow counsel for the Estate to make an offer of proof by putting Dr. Lalouche on the witness stand and having him testify to the evidence he would have been able to offer had the Court not excluded his testimony. It is essential that in order to preserve error for appeal, that counsel make an offer to prove the facts which the witness will testify to and be able to place in the record sufficient basis to prove that had the testimony been admitted, that it would have been admissible and relevant. Roach v. State, 695 N.E.2d 934, 939 (Ind. 1998). In this case, counsel for the Estate was not permitted to make a full offer of proof but rather, the Court simply referred counsel to the written report of Dr. Lalouche, which limited counsel's ability to demonstrate what Dr. Lalouche would be able to testify to if he had been allowed to do so. However, the Court stated that he was not going to allow Dr. Lalouche to testify as an offer of proof and cut off counsel making an offer as well. The net result was to deprive the Estate from making a full and ***23** complete offer of proof.

CONCLUSION

In exercising its discretion to admit evidence in this case, the trial court totally emasculated the Estate by excluding its expert witness, deleting or ordering the deletion of major portions of the medical records and refusing to allow counsel to make an offer to prove the evidence which was being excluded. In so doing, the Court **abused** its discretion and should have allowed

the evidence and subjected it to cross-examination to determine its weight. This Court should reverse the order and foreclosure judgment and order a new trial on the issue of the competency of Mildred.

With respect to the validity of the mortgage, the Estate would submit that the failure to read the instrument to a blind person is fatal to ONB and that the order and judgment of foreclosure should be reversed as a matter of law and that judgment on the foreclosure action be entered in favor of the Estate.

Appendix not available.

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